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No. 00-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

K.D.M., a minor, by and through his father and next friend, W.J.M.,

Petitioner,

v.

REEDSPORT SCHOOL DISTRICT and NORMA PAULUS, in her official capacity as Oregon Superintendent of Public Instruction,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY PETITIONER K.D.M.

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INTEREST OF THE *AMICUS*

Pursuant to Rule 37.3 of this Court, the Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioner.[1] The Becket Fund is a bipartisan and

[1]All parties have consented to the filing of this brief. Letters of consent from the Petitioner and Respondents have been filed simultaneously with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

interfaith public interest law firm that protects the free expression of all religious traditions. *Amicus* is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the right of individuals and organizations to be free from discrimination based on their religious belief and practices.

Our present brief addresses the conflicting results reached by five federal circuits in determining the proper standard for reviewing laws that discriminate on their face against religion, and the problems inherent in the position adopted by the Ninth Circuit in the present case. In particular, this brief focuses on how the discrimination itself—rather than any subsequent "burden" on religious practice—constitutes the First Amendment violation.

SUMMARY OF ARGUMENT

Pursuant to an Oregon regulation, the Reedsport, Oregon School District denied petitioner KDM the ability to receive on-site benefits from a special education program solely on the basis of the religious character of his private school. OR. ADMIN. R. 581-015-0166(3) (1995). He would have been able to participate in the program had his school been a private, non-religious school. He was otherwise eligible to participate in the program.

The Ninth Circuit Court of Appeals reversed the District Court's ruling that the regulation violated the Free Exercise, Establishment, and Equal Protection Clauses. *KDM ex rel. WJM v. Reedsport School Dist.*, 196 F.3d 1046, 1049 (9th Cir. 1999), *reh'g denied*, 210 F.3d 1098 (Apr. 25, 2000). The court held that although the regulation "treats [students in religious schools] differently by denying them state services on the school grounds," no Free Exercise violation existed because the Petitioner did not prove any substantial "burden" on his

religious conduct. *Id.* at 1051.

The First Circuit has also adopted this standard—that the state may discriminate against individuals on the basis of religious belief and practice so long as the burden is not substantial. The Third, Sixth, and Eighth Circuits have adopted the opposite position: Plaintiffs need not prove that a substantial burden exists to obtain relief from a facially discriminatory law. The precedents of this Court support the latter view.

A substantial burden on religious exercise is a threshold requirement for claims seeking religious exemptions to generally applicable laws under the Free Exercise Clause. Such a showing has never been required by this Court in cases involving facial discrimination based on religion. But the court below, and the First Circuit, have grafted the substantial burden requirement taken from the exemption cases onto the separate and distinct line of Free Exercise cases involving laws that discriminate on the basis of religion. The Third, Sixth, and Eighth Circuits have held that no showing of substantial burden is required in Free Exercise cases alleging discrimination. This conflict among the Circuits regarding the basic components of a Free Exercise discrimination claim merits this Court's resolution.

ARGUMENT

The Court below has joined the United States Court of Appeals for the First Circuit in adopting a dangerous and unprecedented standard for reviewing laws that facially discriminate on the basis of religion. These two courts have held that a "substantial burden" on religious exercise—a concept borrowed from this Court's Free Exercise cases involving exemptions to generally applicable laws—must be shown before facial discrimination based on religion can run afoul of the First Amendment. These decisions stand in direct conflict with decisions of the Third, Sixth, and Eighth Circuits. The straightforward record in this case presents an ideal opportunity for this Court to clarify the appropriate Free Exercise standard for reviewing such laws.

1. THE FREE EXERCISE STANDARD CREATED BY THE NINTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT, AND THE THIRD, SIXTH, AND EIGHTH CIRCUITS.

The court below agreed with Petitioner's claim that the regulation at issue discriminates on the basis of religion. *KDM ex rel. WJM v. Reedsport School Dist.*, 196 F.3d 1046, 1050-51 (9th Cir. 1999). The regulation favors students who attend non-religious private schools over students who attend religious private schools. However, in a one-paragraph discussion, the court held that since the Petitioner had not proven a substantial burden on his free exercise of religion, no further review of the discriminatory regulation was necessary:

> That the regulation, standing alone, "discriminates" against students in religious schools, *i.e.*, treats them differently by denying them state services on the school grounds, does not result in a burden on the free exercise of

> religion by someone in the position of KDM or his parents. . . . The mere fact that the District makes its service to KDM available in the fire hall down the street from his school does not amount to suppression of religion or religious conduct.

KDM, 196 F.3d at 1051. The Ninth Circuit has thus adopted a standard whereby the state may discriminate against religion if such discrimination does not substantially burden religious exercise.

In doing so, the court relied on the First Circuit's opinion in *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999) (rejecting claim that tuition grants for secular, but not religious, private schools violate the Free Exercise, Establishment, Equal Protection, Due Process or Free Speech Clauses), *cert. denied*, 120 S. Ct. 329 (1999). That court held that "the Free Exercise Clause [was] not implicated" where students were banned from participating in a tuition funding program because of the religious character of their private schools. *Id.* at 65. The First Circuit ignored the facial religious discrimination of the law, and held that because "education at a parochial school is not a [central belief or practice]" of the plaintiffs, there was no substantial burden on religious exercise and therefore no limitation on Free Exercise rights. *Id.*

The First Circuit and the Ninth Circuit appear to have conflated two distinct lines of cases in this Court's Free Exercise jurisprudence. In cases involving religionists seeking exemptions to generally applicable laws, this Court required as a threshold matter a showing of substantial burden on religious exercise. *See, e.g, Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981) (unemployment compensation law); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (compulsory education law); *Sherbert v. Verner*, 374 U.S. 398

(1963) (unemployment compensation law); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (solicitation ordinance). By contrast, in cases involving challenges to laws that discriminate against religion, this Court has required no such showing. *See, e.g., McDaniel v. Paty*, 435 U.S. 618 (1978) (constitutional provision prohibiting "ministers of the Gospel or priests of any denomination whatever" from serving as delegates to constitutional convention).[2]

As noted by the dissent below, and by six other judges of the Ninth Circuit dissenting from the denial of rehearing *en banc*, this Court's decision in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), should foreclose the panel's idiosyncratic view of the Free Exercise Clause. *KDM ex rel. WJM v. Reedsport School Dist.*, 210 F.3d 1098, 1099 (9th Cir. Apr. 25, 2000) (O'Scannlain, Kozinski, Nelson, Kleinfeld, Tashima, & Wardlaw, JJ., dissenting) ("It is only a matter of time before the Supreme Court confronts this confusion to make clear what should have already been clear to a faithful reader of [*Hialeah*].").

The principle adopted by this Court that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," *Hialeah*, 508 U.S. at 532, does not rely upon a finding of additional "substantial burdens" on religious

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[2] *McDaniel,* in fact, precludes the Ninth and First Circuits' position, which was adopted by the Tennessee Supreme Court in that case. The state court held that the disqualification of clergy "simply does not impose any burden, direct or indirect upon religious belief or religious action." *Paty v. McDaniel*, 547 S.W.2d 897, 903 (Tenn. 1977). This claim was rejected by this Court, which required no such showing of burden on religious belief or action.

exercise. *Hialeah* made clear that the proper test is:

> if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, . . . , and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.

Id. at 533. Moreover, "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* In this case, how far the Petitioner must walk to receive the benefit, and whether that is a substantial burden on his religion, does not in any way affect the basic fact that the government is facially discriminating against him based on his decision to attend a religious school. It is discrimination that may in the end be justifiable if the regulation is narrowly tailored to serve a compelling state interest, but it is discrimination nonetheless. And this Court has never required a showing of substantial burden in such cases.

Although the Ninth and First Circuits have thus permitted explicit, religious discrimination (subject to heightened scrutiny only when the discrimination substantially burdens religious exercise), the other courts that have considered this question have soundly rejected such a rule. *Brown v. Board of Mahaffey*, 35 F.3d 846 (3d Cir. 1994); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998). In each of these cases, the respective Court of Appeals ruled that facial discrimination itself violates the Free Exercise Clause when such discrimination cannot survive strict scrutiny.

The facts of *Peter* are nearly identical to the present case: a Minnesota law prohibited school districts from providing special education services at private religious, but not private non-religious, schools. *Peter*, 155 F.3d at 994. The Eighth

Circuit ruled that the "[g]overnment discrimination based on religion violates the Free Exercise Clause . . . the Free Speech Clause . . . and the Equal Protection Clause." *Peter*, 155 F.3d at 996. The precise extent of the harm suffered by that plaintiff was irrelevant; if the denial of services was based on religious discrimination, the plaintiffs were entitled to relief. *Id.* at 997-98.

Similarly, in *Brown*, where a Borough intentionally prevented individuals from accessing revival meetings, the Third Circuit properly held that issues of "substantial burden" were irrelevant in cases of discriminatory government action. *Id.* at 849-50 ("The rare cases which address acts or laws which target religious activity have never limited liability to instances where a 'substantial burden' was proved by the plaintiff.").

And in *Hartmann*, where religious child care centers were prohibited by Army regulation from participating in its Family Child Care program, the Sixth Circuit held that the plaintiffs did not need to demonstrate a substantial burden on the practice of their religion, but rather held that the discriminatory law was "'invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.'" *Id.* at 979 (quoting *Hialeah*, 508 U.S. at 533).[3]

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[3]The Ninth Circuit's attempts to distinguish *Brown*, *Hartmann*, and *Peter* are deeply flawed. The court simply stated that the present case is "wholly unlike" *Brown* and *Hartmann*, without further explanation. *KDM*, 196 F.3d at 1050. It distinguished *Peter*, a nearly identical case, by arguing that the plaintiff there was burdened by having to enroll in a public school, rather than having to leave school premises for a certain period to receive the services at a nearby fire hall, as the Petitioner would be required to do. *KDM*, 196 F.3d at 1050-51. However, this distinction falls apart in light of the court's reliance on *Strout*, where the law at issue likewise would have

The logical implications of *McDaniel*, *Hialeah*, *Peter*, *Brown*, and *Hartmann* are clear: if a showing of substantial burden on religious exercise were necessary to challenge facially discriminatory laws, governments would be free to discriminate freely among religions, or between religion and irreligion, so long as the burden did not amount to a "substantial" one. Under the framework set forth by the court below, and by the First Circuit, a regulation relegating Presbyterians, atheists, or any religious person to the back of a city-operated bus would pass constitutional muster, since merely going to the back of a bus would not substantially burden the exercise of their chosen faith. *See Brown*, 35 F.3d at 849-50 ("Applying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment."). This the First Amendment cannot countenance.

The non-discrimination mandate of the Free Exercise Clause at issue in *Hialeah*, *McDaniel*, and this case reflects a principle also present in this Court's Equal Protection and Establishment Clause cases: that the government may only distinguish between persons based on their religion for reasons of the highest order. *See Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (the State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation"); *Larson v. Valente*, 456 U.S. 228, 245 (1982) ("This constitutional prohibition of denominational

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required the plaintiffs to leave their religious school to receive benefits. It is clear that the split between the Circuits is firm, and that the distinctions made by the Ninth Circuit do not justify its departure from a proper interpretation of *Hialeah*.

preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (constitutionality is presumed "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage").

The concept of "substantial burden"—borrowed from the line of Free Exercise cases addressing the issue of whether the Constitution mandates religious exemptions to generally applicable laws, is as out of place in Free Exercise cases dealing with discrimination against religion, such as *McDaniel*, *Hialeah*, or this case, as it would be in Equal Protection cases or Establishment Clause cases involving sect preferences.

Under the Equal Protection Clause, it is well established that when laws treat individuals differently based on these classifications, it is the discriminatory treatment itself, not any subsequent burden, which violates the Constitution. *See, e.g., Reed v. Reed*, 404 U.S. 71, 76 (1971) (statute favoring fathers over mothers in the administration of a deceased child's estate held invalid). The Court in *Reed* did not weigh burdens, but rather held that the discrimination on its face violated the Constitution because the classification was wholly unrelated to the objective of the statute. *Id.* at 76 ("To give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice" forbidden by the Constitution). A consistent feature of gender discrimination analysis is that facial discrimination itself is presumed invalid. *See Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980) (striking a statute that required widowers, but not widows, to show incapacitation in order to recover benefits for a spouse's death: "our precedents require that gender-based discriminations must serve important governmental objectives and that the discriminatory means

employed must be substantially related to the achievement of those objectives"); *Kirchberg v. Feenstra*, 450 U.S. 455, 459 (1981) (invalidating a statute that granted only a husband the right to manage and dispose of jointly owned property: "Because this provision explicitly discriminated on the basis of gender, the Court of Appeals properly inquired whether the statutory grant to the husband of exclusive control over disposition of community property was substantially related to the achievement of an important governmental objective.").

Discrimination based on national origin is also presumed invalid, without consideration of "burdens." This Court's decisions "have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (footnotes omitted); *id.* at 376 ("The classifications involved in the instant cases, on the other hand, are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired."). The same is true for racial discrimination. *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (per curiam) (overruling an African-American man's conviction for contempt following his refusal to sit in the "section reserved for Negroes," and holding that "[s]tate-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its laws.").

Similarly, in *Larson v. Valente*, this Court did not need to examine whether discriminating against the Unification Church in a charitable solicitation statute burdened its members' faith or not—the discrimination itself was sufficient to trigger strict scrutiny. 456 U.S. at 246 ("In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.").

The same is true with Free Exercise claims involving discrimination, as *Hialeah* and *McDaniel* illustrate, and as the Third, Sixth, and Eighth Circuits have held. There is no basis in this Court's Free Exercise jurisprudence for borrowing the "substantial burden" requirement from cases involving generally applicable laws, and applying it to cases involving religious discrimination. By conflating these two lines of cases, the Ninth Circuit below and the First Circuit have created a new legal test governing claims of discrimination under the Free Exercise Clause. This test conflicts with the decision of three other circuits and represents a dramatic departure from this Court's precedents.

CONCLUSION

For the foregoing reasons the writ of certiorari to the Ninth Circuit Court of Appeals should be granted.

Respectfully submitted,

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